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In the

Supreme Court of the United States

OCTOBER TERM, 1953

No. 216

THE FRITO COMPANY,
Petitioner,

v.

GENERAL MILLS, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The Frito Company, a Texas corporation, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on March 30, 1953, and which became final on May 13, 1953, on denial of motion for rehearing. (R. 223.)

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at *202 F. 2d 936*, (R. 193-97). The opinion of the United States District Court, Northern District of Texas, Dallas Division, is reported at *103 F. Supp. 563* (R. 178-79).

JURISDICTION

The judgment of the Court of Appeals was entered on March 30, 1953, and became final on May 13, 1953, when petitioner's motion for rehearing was overruled. (R. 223.) The jurisdiction of this Court is invoked under *28 U. S. C. A., Section 1254(1)*.

QUESTIONS PRESENTED

1. Under *15 U. S. C. A. 1071* and *35 U. S. C. A. 63* (Trademark Act of 1946), is a petitioner in the United States District Court entitled by such statutes to a trial de novo or may the court hold such proceeding to be a simple appeal to revise or affirm?

2. Are consumer surveys inadmissible in trademark causes by virtue of the hearsay rule when such evidence is offered to show public belief and not for proving the truth of such survey results?

3. Where a United States District Court, acquiring jurisdiction under *15 U. S. C. A. 1071* and *35 U. S. C. A. 63*, made no affirmative findings of fact and conclusions of law to support its judgment, may a Circuit Court go behind

such judgment and findings to an opinion of an Assistant Commissioner of Patents to cure such fatal defects?

4. Should petitioner's trademark CHEE•TOS, a cheese flavored puffed corn snack, be denied registration because it is alleged that it is likely to cause confusion with respondent's mark CHEERIOS, a breakfast food.

STATUTES INVOLVED

The pertinent statutory provisions are printed in Appendix A, infra, p. 22.

STATEMENT

Petitioner, The Frito Company, manufactures an oblong puffed cheese snack product and markets the same under the trademark CHEE•TOS. This product was first sold in interstate commerce by the petitioner on September 30, 1948, and has been sold continuously in interstate commerce since that date. (R. 94.) The respondent manufactures a breakfast food and has marketed the same under the trademark CHEERIOS since 1945, having prior to that time used the trademark CHEERIOATS. (R. 130-132.) The petitioner sought registration of its trademark CHEE•TOS with the United States Patent Office, and after the mark had been passed by the Examiner of Interferences in the Patent Office, respondent, pursuant to *15 U. S. C. A. 1063* (the opposition section) filed an opposition to the mark on the statutory ground of likelihood of confusion [*Title 15, U. S. C. A. 1052 (d)*]. The Patent Office, in the opposition proceeding, held that there was a likelihood of confusion

and refused registration, mentioning especially respondent's crackers as grounds therefor. (R. 22.)

In the trial before the District Court, General Mills, the respondent, stipulated that its CHEERIOS cracker registration had not been used since 1942 (R. 121) which, petitioner believes, constitutes clear and convincing evidence of abandonment. Such cracker registration was given substantial weight by the Examiner of Interferences and by the Assistant Commissioner of Patents in refusing registration of petitioner's mark. (R. 22.) Further, petitioner is entitled to registration of its mark CHEE•TOS as a matter of law unless, when applied to the goods of the petitioner, it is likely to cause confusion or mistake or to deceive purchasers [*15 U. S. C. A., Section 1052 (d)*].

The evidence adduced before the District Court showed that petitioner had sold over 36 million packages of its product under the trademark CHEE•TOS and that respondent had sold over 600 million packages of its product and that both products had been sold concurrently on the market since September of 1948. (R. 99.) (R. 130-31.) The evidence also showed that petitioner sold its product in 38 states and respondent sold its product in all 48 states. (R. 94.) Respondent's own witness, R. L. Brang, Vice President, testified of receiving some 200 to 300 letters per day concerning CHEERIOS but that he did not know of a single instance of any confusion between the products, even though some three and one-half years had expired during which the products had been sold concurrently on the market. (R. 126-27.)

Applicant brought its suit in the U. S. District Court pursuant to *15 U. S. C. A. 1071* and under *Section 4915* of the *Revised Statutes (35 U. S. C. A. 63)*; the District Court treated petitioner's action as an appeal from the determination of the Assistant Commissioner of Patents and affirmed the Assistant Commissioner's decision. (R. 178.)

The District Court made no independent finding of likelihood of confusion or mistake, but stated: (R. 178)

> "I am unable to say that such use by the plaintiff is not likely to cause confusion."

The District Court further stated:

> "Now, that same statute, by which the Patent Commissioner is bounden, and within which he acts, is the statute which controls the District Court in seeking to *revise or to affirm his decision.*" (Emphasis added.)

The majority opinion of the Court of Appeals for the Fifth Circuit stated that there was no finding on the part of the District Court of confusion or likelihood of confusion stating: (R. 195)

> "This leaves us without any finding on the part of the District Court that the challenged trademark resembled the trademark CHEERIOS, or was likely to cause confusion or mistake or to deceive customers;"

The majority opinion, in order to cure the fatal defect of the District Court in failing to make sufficient findings of fact and conclusions of law to support its judgment, went behind such judgment and findings to an opinion of the

Assistant Commissioner of Patents which, by statute *(35 U. S. C. A. 63)*, is only evidence, and based its affirmance of the judgment solely on said opinion when, by law, in a trial de novo, this cannot be done and the said Fifth Circuit had previously held this in the case of *Border Gas Company v. Windrow, 3 F. 2d 974.*

The Court of Appeals for the Fifth Circuit was divided in this cause and the minority filed a dissenting opinion, expressly setting out that this proceeding was de novo, to-wit:

> "In what are usually denominated Section 4915 proceedings, (15 U. S. C. A. 1071; 35 U. S. C. A. 63), such as the present, while the determination of the Commissioner of Patents should be accorded weight by the Courts, still the judicial power must be exercised upon the consideration of the case presented in its entirety. The *Statute provides* the aggrieved party the *remedy* of a *judicial proceeding* in which the *question involved is to be considered de novo.*" (Emphasis added.)

During the course of the trial in the District Court, petitioner sought to offer evidence which it had procured by means of a consumers' survey for the purpose of showing the public's reaction and belief. (R. 115-17.) Petitioner did not seek admission of the results of the survey to prove the truth of the assertions made, but to indicate the state of mind of the public on the question of likelihood of confusion between CHEE•TOS and CHEERIOS. Those who made the survey were present in the courtroom, had been sworn as witnesses, were available for cross-examination, and were present in order that the trier of the facts would be

able to judge their credibility. (R. 115.) All evidence of this consumers' survey was excluded by the court on the grounds of hearsay. (R. 117-18.)

With the uncontradicted evidence in this cause being that CHEERIOS (breakfast food), had not been advertised as a snack since 1948; that it was not even suitable as a snack unless other ingredients were added by the consumer to convert it from a breakfast food into a snack; and that crackers under trademark CHEERIOS had not been sold since 1942, it is submitted that respondent completely failed to make even a prima facie case for denying petitioner's registration of its mark CHEE•TOS. (R. 175.) (R. 141.) (R. 121.)

REASONS FOR GRANTING WRIT

1. THE DECISION OF THE DISTRICT COURT AND THE MAJORITY OF THE COURT OF APPEALS, FIFTH CIRCUIT, IN HOLDING PETITIONER'S ACTION NOT TO BE A TRIAL DE NOVO IS IN DIRECT CONFLICT WITH *Century Distilling Company v. Continental Distilling Company, 106 Fed. 2d 486 (3rd Cir.) Certiorari Denied, 309 U. S. 662; General Talking Pictures v. American T. Corporation, 96 Fed. 2d 800 (3rd Cir.); Harper v. Zimmerman (D.C.), 41 Fed. 261, 264; Victor Talking Machine Company v. Brunswicke, Balke, Collender Company (D. C.), 290 Fed. 565, 569, 570; Hernandez v. Prizma (D. C.), 39 Fed. 2d 196;* and *Mont-O-Min Sales Corporation v. Wyeth, Inc., 92 Fed. Supp. 150.*

The Honorable District Judge stated in his opinion: (R. 178)

> "Now, that same statute, by which the Patent Commissioner is bounden, and within which he acts, is the statute which controls the District Court *in seeking to revise, or, to affirm his decision.*" (Emphasis added.)

The majority, in the opinion of the Court of Appeals, Fifth Circuit, stated: (R. 196)

> "* * * we conclude that the action of the Commissioner *was not unsupported by sustantial evidence* and not clearly erroneous." (Emphasis added.)

The Court of Appeals termed the action of the petitioner an appeal when it stated: (R. 194)

> "The District Court *affirmed the decision of the Commissioner* and the applicant appealed under Section 1121, Title 15, U. S. Code." (Emphasis added.)

Thus, it is seen that both the District Court and the majority of the Appeals Court below erroneously held that petitioner's action was an appeal from the decision of the Patent Commissioner and not a trial de novo.

The minority opinion of the Court of Appeals, however, did not make this mistake, but rather called attention to the fact that a proceeding of this nature is a trial de novo, said minority opinion providing in part as follows: (R. 196)

> "The statute provides the aggrieved party the remedy of a judicial proceeding in which the question involved is to be considered de novo."

The holding in the *Century Distilling Company* case, above cited, especially states:

> "A suit under Section 4915 (35 U. S. C. A 63)* is 'an original independent action in which the questions in issue are tried de novo upon all competent evidence new and old." *Insert added.

Also, in *General Talking Pictures v. American T. Corporation*, above cited, it is stated:

> "A suit under Section 4915 is an original independent action in which the questions in issue are trial de novo upon all competent evidence new and old."

Further, in *Mont-O-Min Sales Corporation v. Wyeth, Inc.*, above cited, the following is provided:

> "The instant proceeding before the Court is a trial de novo to determine the right of plaintiff to have its mark Mont-O-Min registered as a trademark in the Patent Office on the application it made therefor. That means that every issue as to the registerability of such proposed mark is before the court for consideration and determination."

It is obvious, therefore, that the District Court and the majority of the Court of Appeals viewed the record presented to it to determine whether or not the decision of the Patent Commissioner was supported by "substantial evidence" and upon finding that it was so supported, affirmed the decision of the Patent Commissioner. (R. 178-79.) (R. 193-96.)

The decision of the Court of Appeals here, in conflict with the above cited decisions, placed an unreasonable bur-

den upon the petitioner and will place on all applicants for registration of marks the burden of showing that the decision of the Commissioner of Patents was not supported by substantial evidence in the record. By statute *(35 U. S. C. A. 63)*, the substantial evidence rule has no place in a proceeding of this nature and to apply said rule is unreasonable and is insupportable in law especially in view of the express statutory provisions providing for a trial de novo.

2. THE DETERMINATION BY THIS HONORABLE COURT ON THE ISSUE OF THE ADMISSIBILITY OF CONSUMER SURVEYS IN EVILENCE IS VITALLY NEEDED BY BOTH THE BAR AND THE PUBLIC, FOR THE DECISIONS ARE CONFLICTING AND INDISTINGUISHABLE.

The Lanham Trademark Act of 1946 laid down a test for either admitting or denying registration of a trademark which requires, in resolving the question of fact, a probe into the consuming public's mind. The group from which evidence is to be derived becomes almost boundless, and it is the group as such, not specific members thereof, which is looked to. The collective attitude is desired and the means to present it in judicially acceptable fashion is the problem which confronts the attorney and bar today. The dilemma exists not because artificially created, but stems from an inherent characteristic of the litigation. The test laid down in the Trademark Act of 1946 is: *Does the use of the alleged infringer's mark create a likelihood that*

purchasers will be confused, mistaken or deceived as to the source of the goods bearing that mark. This is a fact question and the only way to resolve it is to show what the consuming public believes and thinks. What other better and more reliable means is there for proving and for gathering such evidence than that of the consumer survey?

Further, in our modern business, trademarks are recognized as one of the most valuable pieces of property owned and held by business today and when a business is confronted with a contest on its valuable trademarks, such business and its attorneys should be in a position of knowing whether or not consumer surveys are admissible into evidence on such questions. Many times business and the attorney, following the latest cases, prepare, at the cost of many thousands of dollars, consumer surveys only to have them excluded at the time of trial. The situation regarding the admissibility of these surveys can be best described as chaotic.

The cases which refuse admissibility of these surveys on the grounds of hearsay are as follows: *John B. Stetson Co. v. Stephen L. Stetson Co., 14 F. S. 74 (S. D. N. Y., 1936), Aff'd. as Modified, 85 F. 2d 586 (2nd Cir., 1936); Elgin National Watch Co. v. Elgin Clock Co., 26 F. 2d 376 (Del., 1928); DuPont Cellophane Co. v. Waxed Products Co., 6 F. S. 859 (E. D. N. Y., 1934), Modified in 85 F. 2d 75 (2nd Cir., 1936); Radio Corporation of America v. Decca Records, Inc., 51 F. S. 493 (S. D. N. Y., 1943).*

On the other hand, the cases which admit such evidence and deny the validity of the hearsay rule are as follows:

United States v. 88 Cases, 187 F. 2d 967 (3rd Cir.), Sunbeam Corporation v. Sunbeam Lighting Company, 83 F. S. 429 (S. D. Cal., 1949); Quaker Oats v. General Mills, 134 F. 2d 429 (7th Cir., 1943); Campbell's Soup v. Armour Company, 81 F. S. 114 (E. D. Pa., 1948); 22 Corpus Juris, Section 182, p. 218 and *31 Corpus Juris Secundum, Section 208, p. 945.* (Note: The printed opinions on the *Sunbeam* case, *Quaker Oats* case and *Campbell's Soup* case may not discuss admissibility of survey evidence, but the same was brought up during the proceeding of the court as is fully set out in *20 George Washington Law Review, pages 211-232.)*

The United States v. 88 Cases, supra, provides in part as follows:

> "The principal contention, however, was that the survey was hearsay and therefore inadmissible. The hearsay objection is unfounded. For the statements of the persons interviewed were not offered for the truthfulness of the assertions as to the composition of the beverage. * * * They were offered solely to show a fact, the reaction of ordinary householders and others of the public generally when shown a bottle of Bireley's Orange Beverage."

In this case, petitioner sought to offer the results of consumer surveys on the question of confusion and/or likelihood thereof among the grocers and consumers in several market areas, namely, Dallas, Texas; Tulsa, Oklahoma and Chicago, Illinois. (R. 116-17.) The witness testified concerning his experience in making factual surveys and also as to the number of grocers which he had contacted in each of the above named cities and when the wit-

ness was asked to state the results of the survey which he personally made, this was objected to and the court sustained the objection on the ground that it was hearsay. (R. 117-18.) Three other witnesses would have testified as to similiar consumer surveys except for the Court's ruling. (R. 115-117.)

The consumer survey is modern America's method of determining the attitude or state of mind of the public at large; modern business bases its action to a large extent upon results of consumer surveys; such surveys have been accepted by sales organizations, radio and television networks, newspapers, magazines and every type of business. In light of this wide range of acceptance and the degree of accuracy attributed to these said surveys, it is respectfully submitted that a ruling by this court upon the admissibility of such evidence is an absolute necessity in order to clarify the confusion of the lower courts' rulings and to enable business and the bar to know where they stand in the protection of trademarks.

For a full and complete discussion of this question, it is recommended that *Volume 20 of George Washington Law Review, pp. 211 through 232*, be considered.

3. THE ESTABLISHED LAW OF OUR LAND HAS BEEN FOR MANY YEARS THAT A JUDGMENT WHICH IS NOT SUPPORTED BY FINDINGS OF FACTS AND CONCLUSIONS OF LAW CANNOT STAND AND THE CLEAR INTENTION OF CONGRESS, AS EXPRESSED IN THE LANHAM TRADEMARK ACT OF 1946 (15 U. S. C. A. 1071), WAS TO

CONTINUE SUCH ESTABLISHED LAW IN TRADE-MARK CAUSES AND SINCE NO CONSTRUCTION OF THIS IMPORTANT PROVISION OF THE TRADE-MARK ACT HAS BEEN MADE BY THIS COURT SINCE ITS ENACTMENT IN 1946, AND SINCE THE HOLDING OF THIS CAUSE IS CONTRARY THERETO, EXERCISE OF THIS COURT'S SUPERVISORY POWERS IS NECESSARY TO RESTORE SUCH ESTABLISHED LAW AND RESOLVE THE CONFLICT.

Under *Sections 15 U. S. C. A. 1071* and *35 U. S. C. A. 63*, the District Court is without jurisdiction to affirm the ruling of the Patent Office; the proceeding is a trial de novo. This type of action contemplates a new and independent judicial proceeding in which as much new evidence may be admitted as is desired by either party and the Patent Office record is only a portion of the evidence to be considered if one of the parties introduces it; otherwise, it is not to be considered at all by the District Court, *(35 U. S. C. A. 63)*. Certainly a proceeding of this nature requires a new and independent ruling and decision. The only method for affirming a Patent Office decision is by a direct appeal to the Court of Customs and Patent Appeals, not to the District Court. *(15 U. S. C. A. 1071.)* These alternate procedures are explained in *R. J. Moran v. Seeck & Kabe, Inc., 91 F. Supp. 188 (D. C. S. D. N. Y., 1950)*. As stated in that case:

> "Under Section 4915 an applicant is given a choice of remedies. He may *appeal* to the U. S. Court of Cus-

> toms and Patent Appeals or *bring suit* in a district court. If the applicant is satisfied with the record made before the Commissioner, his proper course is to *appeal* to the Court of Customs and Patent Appeals. If he is not satisfied, but instead desires to supplement the record with new matter, his proper course is an equity suit under Section 4915, which is a *trial de novo.*" (Emphasis added.)

It is respectfully submitted that a judgment which is not supported by the findings of fact and conclusions of law should not stand, for such findings and conclusions are the sole basis for the judgment. It is admitted by the majority opinion of the Court of Appeals, 5th Circuit, as follows: (R. 195)

> "This leaves us without any finding on the part of the District Court that the challenged trademark resembled the trademark CHEERIOS or was likely to cause confusion or mistake or to deceive customers."

In order to cure the lack of findings to support the District Court judgment, the opinion of the majority of 5th Circuit goes behind the judgment of the District Court, its findings of fact and conclusions of law, to a portion of evidence, viz., the decision of the Assistant Commissioner of Patents. This is a proceeding under the Trademark Act of 1946 *(15 U. S. C. A. 1071* and *35 U. S. C. A., Section 63).* The statute specifically provides that the testimony and exhibits, or parts thereof, of the record in the Patent Office are only evidence, a portion of the statute reading as follows:

> "The testimony and exhibits, or parts thereof, of the record of the Patent Office, when admitted, shall

have the same force and effect as if originally taken and produced in the suit."

The Fifth Circuit has heretofore held in the case of *Border Gas Co. v. Windrow, 3 F. 2d 974, Fifth Circuit:*

> "This court cannot examine the evidence and supply a necessary finding of fact to support the judgment. *Packer v. Whittier, 91 F. 511.*"

Further, in the *Border* case, the court discusses the case of *Evans v. Kister, 92 F. 828*, and states as follows:

> "In the last mentioned case, in which Judges Taft and Lurton (now Chief Justice and former Associate Justice, respectively, of the Supreme Court) sat, it was said: 'Where the question for review is, as here, whether the facts found are sufficient to support the judgment, it is of the highest importance to him upon whom the burden rested that such special finding of facts shall include every fact essential to support the judgment'."

This case by Fifth Circuit Court of Appeals has subsequently been followed in a long line of decisions. One case in particular following the decision in the *Border* case is *Kendrick Coal & Dock Co. v. Commissioner of Internal Revenue, 29 F. 2d 559.* This was a proceeding seeking a review of an order of the Board of Tax Appeals. The order of the Board of Tax Appeals (now the Tax Court) fixed the deficiency of the tax at the same amount found by the Commissioner of Internal Revenue. The court's opinion states:

> "*Resort may not be had to the opinion to eke out the findings of fact.* It is argued by counsel for re-

> spondent that the Board of Tax Appeals occupies a peculiar position, and that the rule that an appellate court will not look to the opinion of a fact finding court or body to eke out findings of fact, does not apply to the Board of Tax Appeals. We are not persuaded to that view." (Emphasis added.)

Clearly, the foregoing cases establish that a judgment such as the one rendered by the District Court in this cause is not supported by sufficient findings of fact and conclusions of law to uphold it and that the Lanham Trademark Act of 1946 and particularly the sections therein, namely *15 U. S. C. A. 1071 (35 U. S. C. A. 63)*, which provide for a trial de novo, shows that the construction placed upon the said statute by the District Court is erroneous and insupportable in face of such express provisions of the law.

4. THE REGISTRATION OF PETITIONER'S MARK CHEE•TOS AS APPLIED TO PETITIONER'S CHEESE FLAVORED PUFFED CORN SNACK IS NOT LIKELY TO CAUSE CONFUSION OR MISTAKE WITH RESPONDENT'S READY-TO-EAT OAT BREAKFAST CEREAL.

Under the Trademark Act of 1946 [*15 U. S. C. A. 1052 (d)*], it is expressly provided that petitioner is entitled to the registration of its mark CHEE•TOS as a matter of law unless it is likely to cause confusion or mistake. Said statute provides in part as follows:

> "No trademark by which the goods of applicant may be distinguished from the goods of others shall be refused registration on the Principal Register on account of its nature unless it—

> (d) Consists of or comprises a mark which so resembles a mark registered in the Patent Office or a mark or tradename previously used in the United States by another and not abandoned, as to be likely, when applied to the goods of the applicant, to cause confusion or mistake or to deceive purchasers: * * *."

The evidence as adduced before the Court in this case showed that the petitioner had sold over 36 million packages of its product under the trademark CHEE•TOS in interstate commerce and that respondent had sold over 600 million packages of its product in interstate commerce (R. 99) (R. 130-31). The evidence showed that petitioner sold its product in 38 states and that respondent sold its product in all 48 states. (R. 94.) (R. 130.) It was further shown that both products had been sold concurrently on the market since September of 1948. The testimony of respondent's own witness, viz., Mr. R. L. Brang, Vice President, showed he received some 200 to 300 letters per day concerning the product CHEERIOS in the nature of either complaints or compliments, admitted that he did not know of a single instance in which there had been any confusion between the two products CHEERIOS and CHEE•TOS. (R. 126-127.)

A late case construing the particular portion of *Title 15 Section 1052(d)* is found in the case of *Gold Seal v. Marzall, 100 F. S. 187.* The Court in that case set forth the test for determining likelihood of confusion as follows:

> "The question to be determined is whether the use of the two trademarks is likely to cause confusion. In one sense, that is a matter of opinion. So far as evidence is concerned, the *best proof* of the fact *that con-*

> *fusion is not likely to be caused is that no confusion has resulted in numerous past transactions.*" (Emphasis added.)

It is strenuously urged that the above evidence presents sufficient proof to establish a prima facie case of no likelihood of confusion, and at the very least, to place upon appellee a burden of further proceeding to show that there is likelihood of confusion. Concurrent sales for 3½ years for both products to date of trial without any evidence of confusion is certainly sufficient to establish lack of confusion or any likelihood thereof.

At no time has respondent ever contended that its business has been damaged or interfered with because of petitioner's product, but rather the conclusive and uncontradicted evidence is that these products never caused confusion even though some 636 million packages thereof have been sold concurrently on the market in the United States. (R. 99.) (R. 130-31.)

In the case of *Harlan-Wallins Coal Corporation v. Transcontinental Oil Company, 64 F. 2d 122, Ct. of Cus. & Pat. App.*, the Court set forth the following test for determining the same descriptive character of products:

> "The Court will consider use, appearance and structure of articles, similarity of packages, places of sale and buyers thereof in determining whether goods are of the same descriptive character on application for trademark registration."

There was testimony in this cause that the products CHEE•TOS and CHEERIOS were of an entirely different

nature, CHEE•TOS being a snack item and CHEERIOS being a breakfast food and that the said CHEE•TOS were displaced in a rack near the cash register or in other prominent places so as to be called to the attention of the purchaser whereas the product CHEERIOS was displayed with other cereal breakfast food in another section of the store. (R. 98.) (R. 112-114.)

Two recent cases decided by the Court of Customs and Patent Appeals show beyond doubt that petitioner's mark is not likely to cause confusion with respondent's mark. The first of these is *Irma Hosiery Company v. Schulman, 201 Fed. 2d 891*, in which the goods were identical, to-wit, ladies' hosiery, and the marks were more similar than in the instant case, namely, *Scheerazair* and *Scheherazade*. The second case, *Brown and Bigelo v. Eugene Dietzgen Company, 203 F. 2d 764*, involved the marks *Redipoint, Redilite*, and *Redirule*. In these cases, the marks were held to be unlikely to cause confusion.

It is respectfully submitted that, in view of these late authorities and the difference in appearance, sound, and derivation or meaning between the marks of petitioner and respondent, petitioner's mark CHEE•TOS (a snack) is entitled to registration upon the principal register in spite of respondent's mark CHEERIOS (a breakfast food).

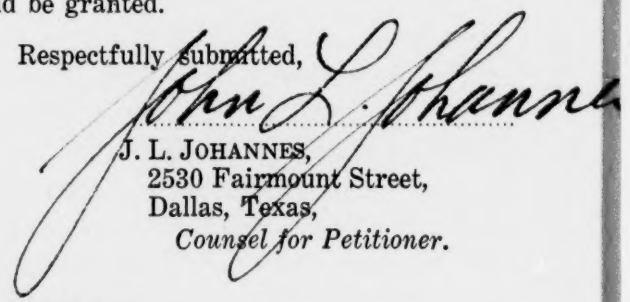
CONCLUSION

A trademark is the warranty of a manufacturer of the quality and fitness of his goods. It is the hallmark of American business. Today there is hopeless confusion exist-

ing in governing what marks may or may not be registered. For example, in the case of *Irma Hosiery Company v. Schulman*, supra, decided this year by the Court of Customs and Patent Appeals, this specialized court was divided three to two upon a simple question of registerability. In the instant case, *The Frito Company v. General Mills, Inc.*, the appellate court was divided. Since the question of trademarks is of major importance to American business, as revealed by the fact that more than 1,200 opposition cases are now pending in the United States Patent Office, a clarafication of the above questions by this Honorable Court would be of inestimable value to American business.

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,



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APPENDIX A

15 U. S. C. A. 1052.

No trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature unless it—

(d) Consists of or compromises a mark which so resembles a mark registered in the Patent Office or a mark or trade name previously used in the United States by another and not abandoned, as to be likely, when applied to the goods of the applicant, to cause confusion or mistake or to deceive purchasers * * *.

15 U. S. C. A. 1071.

Any applicant for registration of a mark, party to an interference proceeding, party to an opposition proceeding, party to an application to register as a lawful concurrent user, party to a cancellation proceeding, or any registrant who has filed an affidavit as provided in section 1058 of this title, who is dissatisfied with the decision of the Commissioner may appeal to the United States Court of Customs and Patent Appeals or may proceed under section 63 of Title 35, as in the case of applicants for patents, under the same conditions, rules, and procedure as are prescribed in the case of patent appeals, or proceedings so far as they are applicable: Provided, That any party who is satisfied with the decision of the Commissioner shall, upon the filing of an appeal to the Court of Customs and Patent Appeals by any dissatisfied party, have the right to elect to have all

further proceedings under section 63 of Title 35, by election as provided in section 59a of Title 35. The Commissioner of Patents shall not be a necessary party to an inter partes proceeding under section 63 of Title 35, but he shall be notified of the filing of the bill by the clerk of the court in which it is filed and the Commissioner shall have the right to intervene in the action. *July 5, 1946, c. 540, Title I, § 21, 60 Stat. 435.*

35 U. S. C. A. 63.

Whenever a patent on application is refused by the Board of Appeals or whenever any applicant is dissatisfied with the decision of the board of interference examiners, the applicant, unless appeal has been taken to the United States Court of Customs and Patent Appeals, and such appeal is pending or has been decided, in which case no action may be brought under this section, may have remedy by bill in equity, if filed within six months after such refusal or decision; and the court having cognizance thereof, on notice to adverse parties and other due proceedings had, may adjudge that such applicant is entitled, according to law, to receive a patent for his invention, as specified in his claim or for any part thereof, as the facts in the case may appear. And such adjudication, if it be in favor of the right of the applicant, shall authorize the commissioner to issue such patent on the applicant filing in the Patent Office a copy of the adjudication and otherwise complying with the requirements of law. In all cases where there is no opposing party a copy of the bill shall be served on the commissioner; and all the expenses of the proceedings shall be paid by the

applicant, whether the final decision is in his favor or not. In all suits brought hereunder where there are adverse parties the record in the Patent Office shall be admitted in whole or in part, on motion of either party, subject to such terms and conditions as to costs, expenses, and the further cross-examination of the witnesses as the court may impose, without prejudice, however, to the right of the parties to take further testimony. The testimony and exhibits, or parts thereof, of the record in the Patent Office when admitted shall have the same force and effect as if originally taken and produced in the suit. *R. S. § 4915; Feb. 9, 1893, c. 74, § 9, 27 Stat. 436; Mar. 2, 1927, c. 273, § 11, 44 Stat. 1336; Mar. 2, 1929, c. 488, § 2(b), 45 Stat. 1476; Aug. 5, 1939, c. 451, § 4, 53 Stat. 1212.*

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

NO. 216

THE FRITO COMPANY,
Petitioner,

vs.

GENERAL MILLS, INC.,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I. PETITION DEVOID OF REASONS NECESSARY TO SUPPORT GRANTING OF WRIT

This is an ordinary trade-mark case involving the alleged right to register a mark. The issue, for which petitioner seeks review, has been fully tried, and four tribunals have successively held against petitioner.

The reasons relied upon in urging that this court grant a writ of certiorari completely fail to meet the requirements of Rule 38 and the established precedents in point. In *Layne & Bowler Corporation* v. *Western Well Works, Inc., et al.*, 261 U.S. 387, this court said that in the usual action a writ of certiorari would not be granted unless the issue involved was of great public importance or that an embarrassing conflict existed between circuit courts of appeal.

These conditions were again emphasized in *Magnum Import Company, Inc.*, v. *Coty*, 262 U.S. 159, wherein it is stated at page 163:

> "The jurisdiction was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing."

Petitioner has failed to show that any of the conditions requisite to the granting of a petition for certiorari are present.

The final ruling for which petitioner seeks review is not in conflict with any decision of other circuit courts of appeal, and no unusual question of public importance is involved.

II. STATEMENT

This is an ordinary action for an order directing the Commissioner of Patents to issue a trade-mark registration to petitioner. On February 16, 1949, petitioner filed an application in the United States Patent Office to register Chee . tos as a trade-mark for a puffed-corn product (15 USCA 1052). Upon publication of petitioner's application for registration, respondent filed an opposition thereto in the United States Patent Office, in accordance with the established practice, under 15 USCA 1063.

The statute involved provides in substance that a trade-mark may be registered *unless* it consists of a mark which so resembles a mark already registered by another as to be likely, when applied to the goods of applicant, to cause confusion or mistake or deceive purchasers. This provision, as interpreted by numerous decisions, prohibits the registration of a mark if it is *similar* to a mark previously registered by another for *related* goods. Respondent's op-

position was based primarily upon its trade-mark Cheerios as previously registered for a puffed-oat product.

The opposition proceedings in the Patent Office were strenuously contested by both parties. Each filed an extensive record comprising testimony and exhibits, and each filed briefs and presented oral arguments before the Examiner of Trade-Mark Interferences. The Examiner rendered a full, well-considered decision sustaining respondent's opposition. Petitioner then appealed to the Commissioner of Patents where the entire record was again considered with extensive briefs and oral arguments. The Commissioner filed an opinion, affirming every finding of the Examiner and adding new findings in favor of respondent. Thereafter, petitioner filed an action in the United States District Court under 15 USCA 1071 and 35 USCA 63, providing for actions of this type (formerly known as "Section 4915—Actions"), whereby the aggrieved party may seek relief as to any final ruling from the Patent Office Tribunal.

The entire record of testimony and exhibits which was considered by the two Patent Office tribunals was filed as evidence in the District Court. At the trial petitioner also introduced additional testimony of the same character as that considered by the Patent Office while respondent relied upon the Patent Office record. After a full trial, the District Court also ruled in favor of respondent, finding, among other things:

> "The name chosen by the plaintiff is Chee . tos. The name which has been used by the defendant for these many years is, Cheerios. *I am unable to say that such use by the plaintiff (petitioner) is not likely to cause confusion as to both origin and use,* I am not bounden to find that it has caused confusion, and, I think that a decree should go for the defendant (respondent) in this case." (R. 179)

Petitioner then appealed to the Court of Appeals (Fifth Circuit). The majority opinion of this court affirmed the findings of the lower court and specifically expressed its agreement with the findings of the Patent Office. There was a dissent, although, as will be shown, this dissent misconstrued the application of the pertinent, well-supported Patent Office findings.

III. REASONS RELIED UPON BY PETITIONER ARE INSUFFICIENT FOR GRANTING WRIT

Petitioner advances four alleged reasons why it believes this writ should be granted (pp. 2-3). Even a cursory reading of these reasons or "questions presented" establishes that petitioner is merely seeking a fifth opportunity to reargue its case. It is elementary that this court will not grant a writ of certiorari to review routine questions of evidence and well-supported findings of administrative tribunals and federal courts.

1. Petitioner Enjoyed a Full Trial de Novo in the District Court.

In its brief, pages 7-10, petitioner cites numerous authorities in support of its contention that it was entitled to a trial *de novo* before the District Court. Respondent agrees fully with this contention and the authorities cited in support thereof. However, respondent challenges petitioner's conclusion that the Court of Appeals (and the District Court) did not consider this action as a trial *de novo*. The record establishes that petitioner had a full, fresh hearing before the District Court and that the majority opinion of the Court of Appeals, in affirming, properly considered the *de novo* record of the District Court.

The fact that the Patent Office record was introduced in

evidence in the District Court does not in any way detract from the character of this proceeding as a trial *de novo*. The introduction of the Patent Office record is permitted by the controlling statute, 35 USCA 63, which provides:

> "In all suits brought hereunder where there are adverse parties the record in the Patent Office shall be admitted in whole or in part, on motion of either party, * * * without prejudice, however, to the right of the parties to take further testimony. The testimony and exhibits, or parts thereof, of the record in the Patent Office when admitted shall have the same force and effect as if originally taken and produced in a suit." (Citations)

That the trial in the District Court was truly a trial *de novo* and was so considered is apparent from its decision. Thus, in the very beginning of the decision the Court says:

> "The Court has been rather liberal in admitting testimony for both the plaintiff, and, the defendant in this matter. The plaintiff offered in testimony 42 different trademarks, and other evidence covering that number, some of which products were cheese products; others, candy, cigars, whiskey, ice cream etc." (R 178)

Had the District Court considered the action an appeal from the Patent Office it would not have permitted the introduction of any other evidence than the Patent Office record. Furthermore, it is evident from the District Court's opinion that it independently considered all of the evidence before it, not merely the Patent Office record, and independently reached its conclusion; namely, that it was not convinced that confusion would not result.

Petitioner lays great stress on the words "in seeking to revise, or, to affirm his decision" appearing in the following quotation from the District Court's decision:

> "Now, that same statute, by which the Patent Commissioner is bounden, and within which he acts, is the statute which controls the District Court *in seeking to revise, or to affirm his decision.*" (Emphasis added.)

This quotation, however, has been lifted from its context. A full review of the District Court's decision in its entirety, however, makes it evident that the District Court did in fact decide the case on the basis of a trial *de novo*.

It is likewise evident that the Court of Appeals considered the District Court trial as a trial *de novo*. Thus the Court of Appeals considered the evidence independently and independently applied the statute to the facts. It likewise reached the conclusion independently that it was not convinced that confusion was not likely. There is nothing in the decision of the Court of Appeals to indicate that it considered the action other than as a trial *de novo*.

From the majority opinion of the Court of Appeals petitioner seizes upon the words "the District Court affirmed the decision of the Commissioner. . . ." It is evident, however, from reading the entire majority opinion, just as it is evident from the District Court's opinion, that the word "affirmed" was used in the sense of "reached the same conclusion" instead of in any sense which would imply that this was a formal appeal from the Patent Office rather than a trial *de novo*.

Petitioner has also urged that, since the Court of Appeals referred to the administrative findings of the Patent Office, the trial could not be a trial *de novo*. This court and other appellate courts have repeatedly relied upon the findings of administrative tribunals and numerous courts have sustained such findings when supported by evidence and when not clearly erroneous. This does not in any way detract from the *de novo* nature of the trial in the

District Court. The authorities clearly establish that, notwithstanding the presentation of additional evidence in a trial *de novo*, the decision of the Patent Office tribunal may not be set aside unless the evidence before the court carries thorough conviction that the Patent Office erred. *Cyclopedia of Federal Procedure*, Third Edition, Vol. 14, §67.59, page 298, states the rule thus:

> "The decision of the Patent Office Tribunal upon a question of fact *must be accepted as controlling and may not be reversed* unless the evidence before the district court carries a thorough conviction that the Patent Office tribunal erred." (Emphasis supplied) (citing):
>
> *Minnesota Mining & Mfg. Co.* v. *Carborundum Co.*, 155 F. 2d 746;
>
> *Heston* v. *Kuhlke*, 179 F. 2d 222;
>
> *S. & S. Corrugated Paper Machinery Co., Inc.* v. *George W. Swift, Jr., Inc.*, 176 F. 2d 358;

The *Minnesota Mining* case, *supra*, held:

> "*Morgan* v. *Daniels* states a rule of law whereby a fact question must be judged. The question therefore is whether all competent evidence, 'new' and 'old,' offered to the District Court carries 'thorough conviction' that the Patent Office erred. *General Talking Pictures Corp.* v. *American T. Corp., supra*, at page 812 of 96 F. 2d. A proceeding under R. S. Section 4915 is an anomaly. The trial in a District Court is a trial de novo. *But the decision of the Patent Office may not be reversed unless the evidence before the court carries thorough conviction that the Patent Office erred.* In other words, a District Court may not reverse the decision of the Patent Office on a mere preponderance of the evidence. More is required. The District Court must find that the decision of the Patent Office was without substantial basis in the evidence or was wrong as a matter of law. * * *" (Emphasis supplied.)

In *Safeway Stores* v. *Dunnell,* 172 F. 2d 649 (C.C.A. 9), the Court of Appeals refused to grant relief to *Dunnell* who was the applicant seeking to register SAFEWAY as a mark for toilet seat covers upon the objection of *Safeway Stores* who had established use of SAFEWAY for grocery products which included paper napkins. In considering the action of the Commissioner of Patents *as binding upon the court,* it held, at page 652:

> "Upon principle and authority, therefore, it must be laid down as a rule that where the question decided in the Patent Office is one between contesting parties as to priority of invention, the decision there made must be accepted as controlling upon that question of fact in any subsequent suit between the same parties, unless the contrary is established by testimony which in character and amount carries thorough conviction.
>
> "This rule is applicable to trade mark cases. * * *"

In the case at bar the District Court and the Court of Appeals properly applied this rule and concluded that the findings of the Patent Office tribunals were fully supported by the facts.

2. District Court's Ruling on Admission of Evidence Was Entirely Proper and Does Not Present an Issue for Granting Writ.

Petitioner, for its second point, urges that lower court improperly excluded certain alleged survey evidence. In the petition, pages 10-12, a number of authorities are cited, purporting to show that there is a conflict between various authorities as to the admissibility of survey evidence. An analysis of the cases cited establishes that no such conflict exists. The law is clear that *scientific surveys, properly conducted,* may be admitted for specific purposes. On the

contrary, alleged facts (other than scientific surveys), comprising an accumulation of purely hearsay statements are not admissible. The record discloses (R. 116-18) that petitioner did not offer true surveys. What it offered was merely an accumlation of second- and third-hand hearsay statements allegedly gathered by one of the petitioner's own employees. Obviously, such statements are clearly inadmissible under the hearsay rule.

In answer to respondent's objection at the trial the court ruled (R. 118):

> "Now, you want to get plain what I rule against you on. You want to introduce testimony that some fellow went around and asked store managers, and so forth, if they had heard of any confusion. That, I hold is hearsay."

Petitioner's counsel agreed with this analysis expressed by the court. (R 118)

Although petitioner labels the material excluded as "survey evidence," reference to the record establishes that it was in no sense the usual survey evidence commonly admitted by the courts. All that petitioner tendered was testimony by its own employees by which it sought to introduce summaries of second- and third-hand statements. The authorities urged by defendant do not support admissibility of such material as defendant offered but stand for the proposition that well-ordered, *scientific* surveys are admissible.

Respondent also objected to the admissibility of the proposed "evidence," on the ground that it was entirely negative in character and, therefore, wholly lacking in probative force and on the further ground that *actual* confusion was not an issue in these proceedings.

This action being strictly statutory to determine the right to register a mark, presents only two questions, namely; whether the marks are similar and the goods related (or of the same descriptive properties). It follows that the question of *actual* confusion is entirely irrelevant. Petitioner sought to capitalize on alleged negative facts, urging the nonexistence of confusion. The fallacy of this approach is immediately apparent since negative testimony such as petitioner sought to introduce can never establish a positive fact.

The admission of evidence as to actual confusion can be pertinent only where that question is in issue. This commonly occurs in the usual cases for trade-mark *infringement and damages.*

The trial court was entirely correct in excluding the so-called "survey" evidence because it was hearsay, negative and directed to the question of actual confusion which is not in issue.

In *Life Savers Corporation* v. *The Curtiss Candy Company,* 81 USPQ 474, a trade-mark case, the court disposed of the same question, stating:

> "In view of the well-known impossibility of proving a negative, it would have been of no help to the court for an equal number of witnesses to have been brought forward to testify that they had not been confused, because such evidence would have in no way tended to rebut the testimony of those giving the affirmative evidence. * * *"

To the same effect see:

Drumond Tobacco Co. v. *Tindley Tobacco Co.,* 52 Mo. App. 10;

Hollins v. *Cotella,* 54 R.P.C. 81;

Oneida, Ltd. v. *National Silver Co.,* 25 N. Y. C. 2d 271.

The record establishes that, if the trial court erred with respect to the admission of evidence, it erred only in being too liberal in admitting much evidence of petitioner which was irrelevant and negative. Notwithstanding petitioner's strenuous efforts (pp. 10-13) to make it appear that there is an embarrassing conflict among the authorities with respect to the admissibility of surveys, this point is not here in issue, nor is there any serious conflict among the authorities as to the admission of genuine surveys in any proceeding, to establish positive, relevant facts.

3. Judgment, Dismissing Petitioner's Complaint, Fully Supported by Findings.

By its third question, petitioner contends that the judgment dismissing its complaint must fail for lack of support by affirmative findings and conclusions.

Heretofore, in the reply to petitioner's first point, it was established that the findings of administrative tribunals, unless clearly erroneous or wholly unsupported by the evidence, must be recognized by the courts. Again the record is clear that the Patent Office tribunals, first speaking through the Examiner of Interferences and then through the Commissioner of Patents, made explicit findings on the issues involved (R. 19-26). Thereafter the trial court, *as a result of the de novo action,* made its findings. (R. 178-9) Thus separate findings were entered three times, twice in the Patent Office and once in the District court, which, in each instance, concluded that under the controlling statute, petitioner was not entitled to secure the registration it sought. In view of this series of explicit findings against petitioner, it is difficult, indeed, to understand how it can seriously urge that the final judgment dismissing its complaint must be reversed for lack of supporting findings.

In the first proceeding the Examiner of Interferences, after carefully analyzing the evidence adduced by both parties, said:

"It is, of course, true, as the applicant contends, that there are specific differences between these goods, and that purchasers would not be likely to buy the cheese flavored corn product of the applicant in the mistaken belief that they were buying the crackers or breakfast food of the opposer, irrespective of any similarity between the marks. The question to be decided in this proceeding, however, is not the possibility of the goods themselves being confused, but whether or not such goods are so related commercially, or otherwise, that their sale under the same or confusingly similar marks is likely to confuse purchasers as to the source of origin thereof. *McKesson & Robbins, Inc.* v. *First Texas Chemical Mfg. Co.*, 600 O.G.170, 159 F (2d) 770, C.C.P.A.; *E. R. Squibb & Sons* v. *Clenolor Products Co.*, 78 USPQ 262; *The Norwich Pharmacal Co.* v. *The National Mineral Co.* 78 USPQ 332. In the present case, the goods involved are inexpensive packaged food products of the type ordinarily sold in grocery stores to the general public, and it is the opinion of the examiner that purchasers would be likely to ascribe a common source of origin to such goods, by reason of their sale under the same or confusingly similar marks, notwithstanding the specific differences therebetween. Cf. *W. B. Roddenbery Co.* v. *Kalich*, 596 O.G.287, 158 F. (2d) 289, C.C.P.A. * * *"

"The marks 'Chee.tos' and 'Cheerios', while differing in both significance and appearance, are quite similar in sound, and it is the opinion of the examiner that their similarity in this respect alone is such that their concurrent use for the specified goods would be reasonably likely to cause confusion or deception of purchasers. Cf. *McKinnon & Co.* v. *Hy Vis Oils, Inc.*, 484 O.G.746, 88 F (2d) 699, C.C.P.A.; *Celanese Corp. of America* v. *E. I. DuPont De Nemours & Co.*, 587 O.G. 4, 154 F (2d) 143, C.C.P.A.

"In support of its argument to the contrary, the applicant makes reference to the fact that there is no similarity between the respective labels upon which the

marks of the parties are displayed, and points out that the record fails to indicate a single instance wherein the marks in question have been the subject of confusion. The labels referred to, however, form no part of the mark of either party and may be changed at will; and hence their differences cannot detract from the confusing similarity between the marks and/or the likelihood of confusion between them. *Goodrich Drug Co.* v. *Cassada Mfg. Co.*, 237 O.G.918, 46 App.D.C.146; *East-Side Winery* v. *Pio*, 78 USPQ 291. Nor is it deemed to be of consequence that the record fails to indicate any instances of actual confusion between said marks, since it is well settled that a prior user in proceedings of this character need only establish a likelihood of confusion, and such confusion will be presumed where, as here, confusingly similar marks are applied to goods of the same general classification. *Celanese Corp. of America* v. *E. I. Du Pont De Nemours & Co.*, 587 O.G. 341, 154 F. (2d) 146, C.C.P.A.; *Sharp & Dohme, Inc.* v. *Abbott Laboratories*, 63 USPQ 350." (R.19-23)

This was followed by the decision from the Commissioner of Patents (R.23-26) where, among other facts, he found:

"The issue presented in this appeal, as correctly stated by the appellant, is whether or not the applicant's mark so nearly resembles the opposer's mark as to be likely when applied to the goods of applicant to cause confusion or mistake or to deceive purchasers, in accordance with the opening sentence of Section 2 (d) of the Trade-Mark Act of 1946. * * *

"* * * it will only be necessary, therefore, to consider the marks of the parties hereto in connection with the goods upon which they are used.

"In regard to the marks, it is the position of the applicant that they do not resemble each other in appearance, meaning, or sound to such an extent that there would be likelihood of confusion. *The examiner, however, considered the* marks 'Chee.tos' and 'Cheerios' to be quite similar in sound and that this

> similarity alone is such that their concurrent use upon the specified goods would be reasonably likely to cause confusion or deception of purchasers. It appears to me that the two marks are not only similar in sound, but that they are also quite similar in appearance."
>
> • • • • •
>
> "The facts presented by this appeal have been given careful consideration, but *I find no error in the conclusion reached by the Examiner.* It is my opinion that the products of the respective parties are so closely related, and that the marks so closely resemble each other in sound and appearance that there would be likelihood of confusion or mistake in the minds of purchasers as to the origin of the applicant's goods with its trade-mark applied thereto.
>
> "The decision of the Examiner of Interferences is affirmed." (Emphasis supplied)

It is apparent that the Commissioner went even further than the Examiner when he found:

> "It appears to me that the two marks are not only similar in sound, but they are also quite similar in appearance."

The trial court fully comprehended the issues which it properly analyzed, as is evident from the following quotation (R. 178):

> "As I read the statute, the trade-mark Commissioner, we will call him, in the Patent Office, *is allowed to act within the wording of the statute itself,* to the effect that it is *likely* to cause confusion, *not* that it does actually cause confusion, but that it is likely to cause confusion. Confusion of product, or, origin, or source of the product." (Emphasis supplied)

The trial court further indicated its agreement with the decisions of the Patent Office tribunals and properly con-

cluded that the same statute which bound the Commissioner of Patents likewise bound the District Court. It is apparent from the trial court's decision that, while the proceeding was a trial *de novo*, the findings of the Patent Office tribunals were not clearly erroneous or wholly unsupported by the evidence. In considering the previous expressions by the administrative tribunal, the trial court proceeded, as it was bound to do, under the established authorities. Section 63 of 35 *USCA; Cyclopedia of Federal Procedure,* third Ed. Vol. 14, P 298; *Minnesota Mining & Mfg. Co.* v. *Carborundum Co.* 155 F (2d) 746; *Heston* v. *Kuhlke* 179 F (2d) 222; *Sand S. Paper Co.* v. *Swift* 176 F (2d) 358 *Safeway Stores* v. *Dunnell* 172 F (2d) 649.

Because the trial court did not, in so many words, say that it found likelihood of confusion, petitioner urges that it was incumbent upon the Court of Appeals to remand the action. Full reading of the trial court's decision makes it clear that it agreed with the findings and conclusions of the Patent Office tribunal. The majority opinion of the Court of Appeals so interpreted the decision.

While the majority opinion on appeal observes that the trial court failed to make a positive finding as to the likelihood of confusion, it properly relied upon the explicit findings of the Patent Office tribunals on this point and concluded (R. 194):

> "Since the District Court was unable to say that the use of the trade name Chee.tos was not likely to cause confusion; and since we are likewise unable to say it is not likely to cause confusion; and since the Commissioner of Patents found that the granting of the applicant's trade-mark was likely to cause confusion or mistake; we conclude that the action of the Commissioner was not unsupported by substantial evidence, and not clearly erroneous." (citing numerous authorities.)

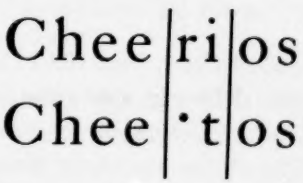
Petitioner strains at the dissent of Circuit Judge Russell. It especially seeks comfort in that portion of the dissent which quotes the District Court as saying, "I am unable to say that such use by the plaintiff is not likely to cause confusion," Judge Russell obviously misinterpreted this statement, for if it is properly read in its full context it can be construed only as a positive finding negatively expressed. The remaining dicta in the dissent shows that Judge Russell did understand the findings of the Patent Office tribunals but he apparently concluded that these findings were clearly erroneous.

It is manifest that the necessary findings and conclusions not only exist but that the District Court and the Court of Appeals each, properly accepted the full and clear findings of the Patent Office, because these findings are supported by the evidence and are not clearly erroneous. It follows that petitioner's third reason for urging certiorari is not supported by the record and is wholly without merit.

4. Controlling Statute Bars Registration of Petitioner's Mark for Related Goods.

The fourth and final question presented merely asks this court to grant petitioner a fifth opportunity to reargue the same issues. The first three questions analyzed in the light of the record are strikingly devoid of substance. The last question although it has no basis to justify granting certiorari, presents the real issue for which petitioner seeks review. It is also apparent that this question is directed to the substance of the case which has been fully tried and considered by four tribunals, each of which reached the same conclusion, denying petitioner relief. It is urged that this court is not a forum in which to reargue for the fifth time ordinary issues which have heretofore been properly determined.

Though it is not necessary to reargue the basic issue here, the court's attention is invited to the simple fact that the words



and

are certainly "similar." Nor is there any basis to seriously contend that the respective products of the parties—one a puffed-oat product and the other a puffed-corn product —are not related and, as numerous authorities have repeatedly held, under such circumstances the controlling statute forbids registration by the newcomer.

In numerous actions considering this statutory issue, such as the following, many courts have construed the meaning of "related goods" and "similar marks":

> Registration of BORDO as a trade-mark for use on canned citrus products was refused in view of opposer's registered trade-mark BARCO as applied to groceries such as mustard, relish, chili sauce, maple syrup and the like. *Bordo Products Co.* v. *B. A. Railton Co.*, 173 F. 2d 981 C.C.P.A.
>
> In *Waldport Seafood Co.* v. *Coe,* 60 F. Supp. 990, the court rejected the right to register "PACIFIC SPRAY" for crabmeat in view of the previously registered trade-mark OCEAN SPRAY for canned cranberries and NORTHERN SPRAY for canned oysters.
>
> SLICES O'GOLD for canned fruit was refused registration in view of the mark SUNSET GOLD for butter. *Sutter Packing Co.* v. *Piggly Wiggly Corporation* 1933, 64 F. 2d 1006, C.C.P.A.
>
> In *Dwinell-Wright Co.* v. *Gundlach,* 1941, 121 F.2d 639, C.C.P.A., WHITE HOUSE for use on ice cream

was denied registration in view of the previously registered mark WHITE HOUSE for tea and coffee. The court held that ice cream on the one hand and tea and coffee on the other, were goods of the same descriptive properties.

Philadelphia Inquirer Co. v. *Coe,* 133 F. 2d 385, is a landmark decision in this field. In that case the Court of Appeals for the District of Columbia, speaking through Justice Vinson, considered the statutory issue at length and made some very clear pronouncements which are still an excellent guide. The following quotations are believed pertinent:

"*Inasmuch as the construction of the applicable statutory provisions is the whole of this case,* we set forth the pertinent language of the Act immediately in order that the four previous determinations in this case may be understood as recited."

"• • • The opinion of the Assistant Commissioner clearly held that the two articles were of the same descriptive properties, and *while observing that there was actually little likelihood of confusion, he concluded that the statute barred registration.*"

"The District Court in a well reasoned opinion held that the goods were of the same descriptive properties and that the marks were identical. The Court further held that the likelihood-of-confusion test was immaterial because that test is addressed to the similarity of the marks and not to the descriptive properties of the merchandise."

"*We believe that the statute bars appellant's right to register. In making this holding we accept the reasoning of the District Court.*

"Appellant bases its argument upon the emphasis that the whole object of statutory and common law trade-mark law is to prevent confusion. With this all-important essence in mind, appellant rides rough-shod

over the nicer standards the statute creates. Appellant takes the likely-to-cause-confusion test at the end of the proviso and reads it all the way back through the Act. Appellant may have a good idea for trademark law. Nonetheless, *the statute must be read and applied* as written."

In commenting upon the strained interpretation which the appellant to register placed upon the statute, the Court said:

> "The construction of the statute to us is clear. * * * The usual problems are *whether the marks are confusingly similar on goods of the same descriptive properties or whether the goods are of the same descriptive properties where the marks are substantially identical.* * * *"

> "* * * Where, however, *this phrase, 'the same descriptive properties,' has evolved so that coffee is classed with horse-radish, fish with tea, mouth washes with cold creams, there cannot be the slightest doubt that these two similar publications are merchandise of the same descriptive properties.*" (Emphasis supplied.)

IV. CONCLUSION

It is urged that the petition for writ of certiorari should be denied because:

1. This case does not come within that class of cases which this court holds subject to review.
2. The District Court and the Court of Appeals properly considered this action *de novo*.
3. The District Court properly admitted the Patent Office record together with new evidence of the same character and both courts properly recognized the administrative findings as they were bound to do.

4. The alleged "survey" evidence was properly excluded as hearsay, negative and irrelevant.

5. Petitioner has had four full fair hearings and is not entitled to reargue this ordinary action for the fifth time, especially not before this Court.

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